

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4151⁶⁶⁹

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P.S.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NORTHSHORE FABRICATORS AND ERECTORS INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT

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Valley Stream, N. Y. 11580



(6904)

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The Company has justifiably refused to bargain with Local 455 due to the fact that the union is not the representative of Northshore's employees and thus no valid certification is outstanding.

The Regional Director grievously abused any discretion granted to him in scheduling an election merely fifteen (15) days after the Direction of Election and a scant six (6) days after the completed Excelsior list was received by the Region.

Section 11302.1 of the National Labor Relations Board's Casehandling Manual, Representation Proceedings (1975), applies to the selection of election dates. Two rules, almost universal in their application, found in this section, state that:

"When, in his decision, the Regional Director directs an election, the election should not be scheduled prior to the 25th day thereafter..." and

"An election may not be held sooner than ten (10) days after the Regional Director has received the list of names and addresses of the eligible voters."

The extreme shortening of the time periods was predicated solely on the insistence of Local 455's attorneys. This unilateral action, without affording the Company and the Intervenor, Local 819, an opportunity to be heard on the application, was accomplished via a letter being forwarded to the Regional Director from Local 455.

The granting of Local 455's application significantly reduced the Employer's and Local 819's chances in the representation election. For this honorable Court to uphold the election results and force the Employer to negotiate would lead to an unjust and undeserved victory for Local 455.

Respondent's brief makes much of the fact that the Regional Director is granted discretion with respect to the conduct of elections. However, no amount of discretion should allow a Regional Director to severely compromise the possibilities of an employer and a rival union in an election. By scheduling the election only six (6) days after the Excelsior list had been furnished, the Regional Director went against established guidelines in both the case law and the provisions of the Casehandling Manual.

Excelsior Underwear, Inc., 156 NLRB 1236 (1966) holds that seven (7) days after the Regional Director has approved a consent-election agreement, or has directed an election, the employer must file with the Regional Director an election eligibility list containing the names and addresses of all the eligible voters. The employer in the instant matter complied in good faith, believing that the election would be held after July 1, 1976, thus disenfranchising the strikers. The Employer's list was received by the parties on June 22, 1976.

On June 23, 1976, Local 455's attorneys mailed a list of the names and addresses of the strikers to the Regional Office. This was received on June 24, 1976 and copies mailed to the Employer and Local 819 on June 25. The Regional Director mailed the official Notice of Election to all parties on June 24, 1976. The election was set for June 30, 1976.

The parties to the election were not given sufficient time to campaign inasmuch as the Board drastically shortened the available time in contravention of its usual practice.

The Board has held in numerous cases that untimely service of the complete Excelsior list would be sufficient grounds for setting an election aside. Coca-Cola Co., 202 NLRB 123, 82 LRRM 1724; Brunswick Corp., 206 NLRB 64, 84 LRRM 1338 (1973); Rockwell Manufacturing Co., 201 NLRB 57, 82 LRRM 1190. The Board has consistently based its decisions on the need to remove any impediments to communication and to foster an atmosphere where the employees have an opportunity to fully hear all the arguments concerning representation.

In Brunswick Corp., supra, the election was set aside due to the delay in the Union's obtaining the Excelsior list. The Board could not blame anyone with certainty for the cause of the delay. The Board once again based its decision on the fact that the possession of the list, merely six (6) days before the election, could have materially affected the results of the election.

In Chemical Technology, Inc., 214 NLRB 50, 87 LRRM 1626 the Board overturned a representation election for the identical reasons set forth in Brunswick. Factually similar to the instant proceeding, the Board in Chemical Technology held that the submission of the second Excelsior list six (6) days before the election gave the union insufficient time to campaign and did not "rebut the Board's presumption of prejudice to the Union's opportunity of access to unit employees, 87 LRRM 1627.

These decisions read in conjunction with the Board's Casehandling Manual lead to the inescapable conclusion that the Regional Director must allow all parties the opportunity to campaign among the employees during a prescribed minimum ten (10) day election period. To substantially reduce the time in which the parties have access to the unit employees is a serious and prejudicial mistake. Utilizing the Board's language, it is quite evident that the Board has not rebutted the presumption of prejudice to the employer's and Local 819's opportunity for informing all the employees of their respective positions.

The inclusion of the strikers in the election eligibility list at the last moment was an unfair surprise foisted on the Employer and Local 819.

The Board cites Louis Allis Co. v. NLRB, 463 F. 2d 512, 80 LRRM 2864. The issue in that case, as well as in the instant proceeding, comes down to one basic question: Whether the Board abused its discretion in the selection of the election date. The facts of Louis Allis dealt with a refusal of the Board to set aside the election without holding an evidentiary hearing on the company's objections. The facts of that case pale by comparison with the circumstances in the instant matter. No mandatory time periods were shortened in Louis Allis. In fact, the employer had twelve (12) days from the time the election date was determined until the actual election and forty-two (42) days between the direction of election and the date of the election. By comparison, the Employer in the instant case had a mere fifteen (15) days from the Direction of Election and a short six (6) day period from the receipt of the Excelsior list until the election date. Furthermore, no unilateral applications were accepted in that case. No travesty of justice nor denial of due process occurred in that Board proceeding.

The Board relies heavily on Kingsport Press, Inc., 146 NLRB 260, 56 LRRM 1006 in its brief. Unfortunately, both the facts of that case and the holding are not apposite to the instant proceeding. In Kingsport, no shortening of any applicable time periods occurred. The only problem confronting the Board concerned the time for filing the briefs. The Board granted the Employer time to file the briefs after the

election, thus treating the briefs as motions for reconsideration. This procedural, rather than substantive tactic, did not affect any party's rights. The case has no relevancy in a controversy such as the present one where substantial harm to both the Employer and Local 819 was the result of the Board's election maneuvering. By altering the election schedule, the Board granted a group of employees, who if precedent, case law, Congressionally passed law, and the Board's own internal procedures were followed would have been denied the vote, the right to control an election.

Section 9 (c) 3 of the National Labor Relations Act provides that an economic striker shall be eligible to vote in an election conducted within twelve (12) months after the commencement of a strike. A compliance with this amendment passed by Congress would have removed the vote from the strikers. The Regional Director and the Board by their actions in this case have interpreted the law to enable economic strikers for a period beyond one (1) year to vote. It is respectfully submitted that it was not the intent of Congress to allow the Board to shorten the customary election time periods to stay within the confines of 9 (c) 3.

The Regional Director's Direction of Election ordered the Employer to comply with the Excelsior case by submitting the list of eligible voters within seven (7) days. The Employer complied by forwarding the names of its employees. The Regional Director then accepted a list of the strikers, forwarded by Local 455, as eligible voters, notwithstanding the fact that this latter group would be ineligible to vote in an election properly scheduled. The Regional Director thus failed to follow his own directive to comply with Excelsior. Furthermore, the late announcement by the Region of the strikers eligibility prevented the Employer from having a sufficient amount of time to campaign amongst the strikers. To say, as the Board states in its brief, that the shortened period fell on all parties equally is not accurate. Whereas the strikers were the recipients of much information from Local 455, the hostility of the strike effectively prevented the Employer from communicating with them. To then force the Employer to campaign within a short six (6) day period was an extremely onerous and futile task.

CONCLUSION

For the foregoing reasons, we respectfully submit that the application of the National Labor Relations Board to enforce its order should be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE
BY MAIL

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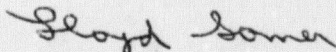
STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

Paula Ann Grande being duly sworn, deposes and says
that deponent is not a party to the action, is over 18 years
of age and resides at Uniondale, New York.

That on the 25th day of January, 1978, deponent served
the within two (2) copies of Respondent's Brief upon the
National Labor Relations Board, in this action at 1717
Pennsylvania Avenue, N.W., Washington, D.C. 20570, the
address designated for that purpose by depositing a true copy
of same enclosed in a postpaid properly addressed wrapper, in
an official depository under the exclusive care and custody of
the United States Post Office Department within the State of
New York.


Paula Ann Grande

Sworn to before me this
25th day of January, 1978.


LLOYD SOMER
Notary Public, State of New York
No. 24-4647149
Qualified in Kings County
Commission Expires March 1979